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No. 87-1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE N. HOOPER,

Petitioner,

vs.

ANTHONY F. MUSOLINO, NORTH DUKE MALL LIMITED PARTNERSHIP, CHARLES S. WARNER, and JOHN W. WARNER

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert G. Nath
[Counsel of Record]
Sally Ann Hostetler
Dexter S. Odin
Odin, Feldman & Pittleman, P.C.
10505 Judicial Drive
Fairfax, VA 22030
(703) 385-7700

Harvey B. Cohen
Cohen, Gettings, Alper & Dunham
P.O. Box 742
1400 N. Uhle Street
Arlington, VA 22216
(703) 525-2260

Counsel for Respondents
Anthony F. Musolino
and John W. Warner, individually and as
Court-Appointed Representatives of
North Duke Mall Limited Partnership

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JURISDICTION

Although Petitioner claims jurisdiction under 28 U.S.C. § 1257 (presumably section three of that statute), he fails to frame a substantial federal question which was raised or decided by the Virginia Supreme Court. To the contrary, Petitioner complains about state substantive and procedural law which, though properly applied, he contends resulted in a denial of "due process." The basis for this argument is that, as a general partner in an accounting action, he was required to account for funds taken from partnership accounts. Second, after he was found to have breached his obligations to the partnership and judgment was rendered against him, he was required to post a bond of $3,370,000 to forestall collection during an appeal. The appeal resulted in judgment being entered against him in the amount of $3,930,000 plus interest from July 26, 1984.

Not only did Petitioner fail to account for partnership monies taken, he never posted the bond of which he now complains. No due process arguments were asserted before the State courts. Only now, for the first time, does Petitioner attempt to frame a federal constitutional "due process" argument. Accordingly, the Petition should be denied for want of a federal question.

STATEMENT OF THE CASE

The Bill of Complaint filed by Anthony F. Musolino ("Musolino") on August 12, 1977 named the Petitioner, Eugene N. Hooper ("Hooper"), Charles S. Warner and the North Duke Mall Limited Partnership ("Partnership") as parties and prayed for an accounting and the recovery of monies due either Musolino

or the Partnership. (Bill of Complaint attached as page A-1) The Bill of Complaint specifically alleged that Hooper failed to discharge his fiduciary duties as general partner; used partnership funds to pay for non-Partnership debts; over-paid himself under the March 22, 1974 construction contract he had with the Partnership; paid himself for work not provided for under the 1974 construction contract; and otherwise diverted and misappropriated Partnership funds. Hooper answered the equity suit and consented to a Decree of Reference (attached as page A-4), referring the case to a Commissioner in Chancery to ascertain and report to the Court on:

> 1. A complete accounting of the assets and liabilities of North Duke Mall Limited Partnership and of the receipt and disbursement of all funds of said partnership from its inception to the present.
>
> 2. Whether any monies are due either the Complainant or North Duke Mall Limited Partnership, or both, from Eugene N. Hooper or Charles S. Warner, or both.

The Commissioner conducted a lengthy evidentiary hearing. On the basis of the Commissioner's report, the Trial Court found that Hooper, a fiduciary with the burden of demonstrating his entitlement to funds taken from the Partnership, not only failed to account for monies paid for construction of an incomplete mall, but failed to keep and produce books and records of the Partnership sufficient to render a complete account of the Partnership affairs. Before the Commissioner, Hooper argued that the $3.8 million he (as general partner) paid himself as contractor was jus-

tified because his construction contract with the Partnership was a "cost-plus" contract. The Commissioner and the Court rejected this argument and specifically found a fixed price contract.

In July 1984, the Trial Court awarded the Partnership judgment in the amount of $8,430,000, but set an appeal bond in the amount of only $3,372,000.

Hooper voluntarily filed a Petition for Reorganization under Chapter 11 of the Bankruptcy laws in October 1984. In his schedules, he listed his net worth at approximately 17 million dollars. That case has been converted to a Chapter 7 liquidation proceeding due to Hooper's failure to comply with a Court Order and unauthorized transfer of property. After the Chapter 11 filing, the Supreme Court of Virginia denied Petitioner's request for a reduction of the amount of the bond suspending execution on the judgment.

After granting a limited appeal, the Supreme Court of Virginia affirmed the decision of the Trial Court, but reduced the judgment to $3,930,000, plus interest from July 1984. No constitutional or federal question issues were raised by any party or decided by Supreme Court of Virginia.

REASONS FOR DENYING THE WRIT

I. Lack of Substantial Federal Question.

A diligent review of Hooper's Petition fails to disclose any federal question presented for this Court's review. Although Hooper states he has been denied "due process" and lists several constitutional amendments upon which he relies, he fails to make any such constitutional argument in his Petition. Moreover, none of the numerous memoranda and briefs in this

lengthy case make any reference to constitutional defects. Accordingly, this Court lacks jurisdiction under 28 U.S.C. § 1257(3) to hear this case.

A generous reading of the Petition is that Hooper contends he was denied "due process" because (1) he was not apprised of the civil claims against him and thus had no opportunity to properly defend and (2) because a bond of $3,370,000 was required to be posted to forestall collection on a judgment ultimately entered by the Supreme Court of Virginia in the amount of $3,930,000.

The first of these "federal questions" not only is based on incorrect facts, but never was preserved by Hooper. The Bill of Complaint specifically requests an accounting of all Partnership assets and liabilities. It charges Hooper (as general partner and a fiduciary) with having mismanaged and misappropriated Partnership funds, and having paid himself monies in excess of those allowed under a construction contract between the Partnership and Hooper (as general contractor) for construction of a shopping mall being developed by the Partnership. Hooper agreed to a Decree of Reference which directed the Commissioner to hear evidence and render to the Court a complete accounting of all assets of the Partnership, including any monies due the Partnership from Petitioner. (A-4.) Hooper now complains about that to which he had previously consented. Such a circumstance can not be permitted to create a due process argument.

An accounting action in Virginia is a well-established equitable procedure in which all accounts among the parties are settled. *Harris v. Magee*, 7 Va. (3 call) 502 (1803); *Iron City Bank v Isaacsen*, 158 Va. 609, 164 S.E. 520 (1932); *Shield v. Brown*, 166 Va. 596,

186 S.E. 33 (1936). The action is founded on the fiduciary relationship between the parties and requires every partner to account for all of his wrongs, including liabilities for assets received but not accounted for, as well as conversions, comingling, negligence and contractual deficiencies. In this action, Hooper, as a fiduciary, bore the burden of establishing his entitlement to funds taken from Partnership accounts, which the lower courts have ruled he failed to do. There is no doubt that Hooper was aware that one of the items for which he was to account was the construction contract under which he paid himself millions of dollars for incomplete construction of a shopping mall lost to foreclosure. Indeed, a substantial amount of the nine days of testimony before the Commissioner consisted of Hooper trying to establish that his construction contract was a "cost-plus" contract and not a fixed price contract. For Hooper to tell this Court he was denied "due process" because he had no notice of the claim begs reality.

The other "federal question" argument advanced by Hooper is that because he was required to post a bond of $3,372,000 to forestall collection by the Partnership during the appeal, he somehow was denied "due process". Initially, it must be noted that Hooper never posted the bond of which he now complains. Moreover, he voluntarily availed himself of the protection of the bankruptcy laws (listing a net worth of approximately 17 million dollars) before waiting for the Virginia Supreme Court to rule on his motion to reduce the amount of his bond. That request was predicated upon a Virginia statute, and no constitutional argument was suggested. It is difficult to find

harm, however, as the bond was still less than the final judgment of $3,930,000 plus interest.

The appeal bond amount was not set arbitrarily. In initially setting the appeal bond at $3,372,000, the Trial Court conservatively estimated the minimum recovery by the partners against Hooper, disregarding any creditors of the Partnership who would have to be paid before any distribution could be made to the partners. The alleged difficulty in someone with a net worth of $17,000,000 posting a bond of $3,370,000 on a judgment of $8,430,000, affirmed on appeal at $3,930,000 plus interest, simply does not constitute a violation of due process.

If Hooper seriously questioned the constitutional impropriety of the prior proceedings, he had many chances to raise the issue and have it decided before resort to this Court. Having not done so, this Court has no jurisdiction to hear these issues for the first time now. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962).

B. Lack of Any Rule 17 Considerations.

The Petition is devoid of any of the considerations usually governing the granting of a review of certiorari as set forth in Rule 17 of the *Rules of the Supreme Court of the United States*. No conflict of the ruling of the Virginia Supreme Court with other courts is articulated. No important question of federal law which needs resolution by this Court is argued. To the contrary, the Virginia court ruled on a particular set of facts under a long standing local procedure.

At best, Petitioner is arguing that this Court should review the Virginia decision because he feels it is

wrong. However, Hooper's legal argument that "return of investment" is the sole liability of a general partner is unconvincing and has been rejected by the state court as unsubstantiated by any authority. No court of justice will ever be heard to say that a general partner can convert partnership loan proceeds totalling millions of dollars to his own use or convey partnership property to himself and be required to do no more than return the partners' investment. The Virginia court ruled accordingly under applicable state law and there is no compelling reason for this Court to review that decision.

CONCLUSION

Respondents request this Court to deny the Petition for want of a federal question and lack of any important issue needed to be decided by this Court.

Respectfully submitted,

Robert G. Nath
[Counsel of Record]
Sally Ann Hostetler
Dexter S. Odin
Odin, Feldman & Pittleman, P.C.
10505 Judicial Drive
Fairfax, Virginia 22030
(703) 385-7700

Harvey B. Cohen
Cohen, Gettings, Alper & Dunham
P.O. Box 742
1400 N. Uhle Street
Arlington, Virginia 22216
(703) 525-2260

Counsel for Anthony F. Musolino and John W. Warner, individually and as Court-Appointed Representatives of North Duke Mall Limited Partnership

APPENDIX

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ANTHONY F. MUSOLINO, Complainant, v. NORTH DUKE MALL LIMITED PARTNERSHIP SERVE: The General Partners Individually and for the Partnership, AND EUGENE N. HOOPER 7115 Leesburg Pike Falls Church, Virginia, AND CHARLES S. WARNER White Post, Virginia Defendants.	*	IN CHANCERY NO. 54683

BILL OF COMPLAINT

COMES NOW the Complainant, ANTHONY F. MUSOLINO, for an accounting pursuant to the Uniform Limited Partnership Act, Section 50-53 (1), and for his grounds he states the following:

1. Attached hereto and incorporated by reference is the North Duke Mall Limited Partnership Agree-

ment (the AGREEMENT) executed by the signators thereto on February 12, 1973, and amended on April 25, 1974.

2. Pursuant to the AGREEMENT, the property identified in Paragraph 1.03 was acquired, funds were borrowed, construction commenced, and all things required of him as a Limited Partner were fully performed by the Complainant, ANTHONY F. MUSOLINO.

3. The General Partner, EUGENE N. HOOPER, on behalf of the Limited Partnership entered into a contract with himself, for the construction of the project. A copy of the contract dated March 22, 1974, is attached and incorporated by reference.

4. Defendant, EUGENE N. HOOPER, as General Partner-Contractor, failed to discharge his fiduciary duties to the Partnership, and in the course of his interdealings he did, inter alia, the following:

(a) Partnership funds were used for the purpose of discharging the business debts of Eugene N. Hooper.

(b) Partnership funds were paid to Eugene N. Hooper for work, labor and materials which were not provided and/or performed in accordance with his obligations as General Partner-Contractor to the Partnership.

(c) Funds of the Partnership were misused, misappropriated and diverted from Partnership purposes.

(d) In derogation of his fiduciary obligations, Eugene N. Hooper agreed on behalf of the Partnership as its General Partner with himself as Contractor for

the Partnership, to undertake the obligations which were of benefit to him as the Contractor.

(e) Eugene N. Hooper has paid to himself as the Contractor sums of money for the performance of work for which he as the Contractor had already been fully compensated. Eugene N. Hooper also paid himself to correct work which was not in the first instance performed in accordance with the terms of the Contract.

4. The Defendants, EUGENE N. HOOPER and CHARLES S. WARNER, have failed to render the financial reports, provide the audits, and render requested accountings to the Complainant, ANTHONY F. MUSOLINO, as required either by law or pursuant to the Agreement of the parties or in deference to his request for the same.

WHEREFORE, Complainant prays that an accounting of the assets of the Partnership be immediately had, that such monies from the General Partners as fiduciaries as may be due either the Complainant or the Partnership be recovered, that such injunctive relief as may be required to protect either the Complainant or the Partnership's interest be issued as the circumstances may from time to time require, and that the Complainant have such other and further relief as to the Court may deem just and proper.

ANTHONY F. MUSOLINO

BY: /s/
DEXTER S. ODIN

ODIN, FELDMAN AND PITTLEMAN, P.C.
10505 Judicial Drive, Suite 202
Fairfax, Virginia 22030
(703) 385-7712

BY: /s/
DEXTER S. ODIN

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ANTHONY F. MUSOLINO,	*	
	*	
Complainant,	*	
	*	
v.	*	
	*	
NORTH DUKE MALL LIMITED	*	IN CHANCERY NO. 54683
PARTNERSHIP, *et al.*,	*	
	*	
Defendants.	*	
	*	

DECREE OF REFERENCE

THIS CAUSE came on to be heard this 3rd day of April, 1988, upon the Bill of Complaint and all other pleadings previously filed herein, and

IT APPEARING TO THE COURT that proper service of process has been obtained upon all of the Defendants and that this cause has duly matured for hearing and is now properly upon the active docket of this Court, it is therefor

ADJUDGED AND DECREED that this cause be, and it hereby is, referred to John J. Karcha, one of the Commissioners in Chancery of this Court, who shall ascertain and report to the Court as follows:

1. A complete accounting of the assets and liabilities of North Duke Mall Limited Partnership and of the receipt and disbursement of all funds of said partnership from its inception to the present.

2. Whether any monies are due either the Complainant or North Duke Mall Limited Partnership, or both, from Eugene N. Hooper or Charles S. Warner, or both.

3. Whether any injunctive relief is required to protect the interests of the Complainant or of North Duke Mall Limited Partnership.

ENTERED this 3rd of April, 1988.

/s/ Richard J. Jamborsky
JUDGE

PRESENTED:

ODIN, FELDMAN & PITTLEMAN, P.C.
10505 Judicial Drive
P.O. Box 367
Fairfax, Virginia 22030

BY: /s/
DEXTER S. ODIN
Counsel for Complainant

SEEN:

/s/
DONALD T. CHEATHAM
Counsel for Charles Warner

/s/
STEWART P. DAVIS
Counsel for Hooper